THE POWER OF THE UNITED STATES UNDER THE CONSTITUTION TO ENTER INTO LABOR TREATIES

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THE Covenant of the League of Nations provides for international conferences which shall propose treaties to the states of the League for the joint regulation of certain labor questions. If the United States is a member of the League, and its representatives agree in conference that the regulation by international agreement of a particular question is necessary, as for example, that night work for women should be prohibited by all the signatory powers, the question arises at once whether, under our form of government, the treaty embodying the decisions of the Conference, can be constitutionally ratified by our government, and, if so, whether Congress can pass the laws necessary to carry it out.

Dr. Andrews [1] and Mr. Elkus [2] have already discussed the character of, and the reasons for, the regulations likely to be proposed; it remains for me to bring to your attention the less interesting, but, nevertheless, vital constitutional question. I shall not consider here whether it will be more advisable to adopt the other plan proposed in the convention, that the contracting governments agree to recommend the passage of legislation to carry out the reform proposed, a plan which to say the least is rather cumbersome in our system of forty-eight states with varying opinions in regard to their own interests and the economic advantage of the reforms suggested. If a treaty be possible, then there is a question of policy as to which method should be preferred in regard to each reform; if not, then the more cumbersome scheme must be adopted if anything is to be done.

[1] See p. 444.

[2] See p. 438.

The Grant of The Treaty Power in the Constitution

The treaty power is granted to the federal government in the most general and inclusive terms:

> He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur. (Art. II, Sec. 2, Clause 2.)

To protect further any rights secured under treaties and to make secure the settlement of treaty questions in the federal courts, and so to emphasize the exclusive nature of the federal control over treaties, the Constitution further provides:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and *treaties made, or which shall be made,* under their authority. (Art. III, Sec. 2, Clause 1.)

Not satisfied, however, with the implied prohibition upon the power of the states, the fathers went a step further and expressly prohibited relations between states and foreign countries:

> No State shall enter into any treaty, alliance, or confederation. (Art. I, Sec. 10, Clause 1.)
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> No State shall, without the consent of Congress . . . enter into any agreement or compact with any State, or with a foreign power. (Art. I, Sec. 10, Clause 2.)

Therefore, both by direct grant to the federal government and by express limitation on the action of the states, is the treaty power vested exclusively in the federal government and the intention of the Constitution made doubly clear, that as to foreign relations the United States shall be a single unit expressing its will through the President and two-thirds of the Senate. Only through the action of the United States Government can the interests of this country and of its citizens be protected abroad. Only in this manner can we enter into those arrangements between governments which, as the society of nations becomes closer knit, and intercourse more frequent and more vital, increase in number and in importance. Wisely did the founders of our government set no express limit to this power of the federal government; but granted it in general terms, so that it could be extended to any of the new develop-

ments in international life which might require the joint action of states.

Treaties are the Law of the Land and as such Prevail over Conflicting State Statutes

The Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything to the contrary notwithstanding. (Art. VI, Clause 2.)

Such are the words of the Constitution, and the federal and state courts have followed them faithfully. Although frequently state statutes passed in legitimate exercise of the reserved powers of the states have come into conflict with treaties, the state statutes have in every case been declared invalid and the treaties upheld.

Property rights of aliens was the first point of conflict between treaties and state laws, which came before the Supreme Court for decision. It was held in the case of Ware *v.* Hylton (3 Dall. 199) that an act of Virginia, passed during the Revolution, in relation to the property of a British subject, which was in conflict with the treaty of peace, was nullified by the treaty in consequence of Article VI of the Constitution. Although the treaty was made before the Constitution was adopted, that instrument expressly provided that all such treaties should be *the supreme law of the land* and should be superior to any state statute. Said Judge Chase in his opinion:

. . . There can be no limitation on the power of the people of the United States. By their authority the state constitutions were made, and by their authority the constitution of the United States was established; and they have the power to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty and fall before it; can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide. . . . If a law of a state, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a state legis-

lature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole (pp. 236-237).

Perhaps the most complete right of the states is that of settling in their own way the ownership of land and other property over which they have jurisdiction; but this right has frequently been expressly declared to be subordinate to the treaty power of the United States. By the common law and by the statutes in force in many of the states, aliens were not permitted to inherit land, nor could an alien transmit land to his heirs. The property in either case was escheated to the state, because there was no " heritable blood " in an alien. The treaty with Great Britain in 1794 expressly granted to British subjects the right both to inherit land in the United States and to transmit the title to their land to their heirs, thus depriving the states of property which otherwise would have come to them and interfering with their judgment as to who should own land within their territories. The Supreme Court, however, found no difficulty in upholding the treaty in the case of Fairfax *v.* Hunter (7 Cranch 603), and its rule has been followed in all of the succeeding cases, so that there is no question that it is the settled law of the United States. The rule was applied by the Supreme Court in the case of Orr *v.* Hodgson (4 Wheat 453), Chirac *v.* Chirac (2 Wheat 259); De Geofroy *v.* Riggs (133 U. S. 258); Hauenstein *v.* Lynham (100 U. S. 483).

Even the taxing power of the states is not free from interference by the federal government under the treaty power. Many of the states subject foreigners to heavier inheritance taxes than citizens, and it has been frequently held in the state courts that where such statutes conflict with treaty provisions they must yield to the "supreme law of the land", see *Treaties, Their Making and Enforcement* by Crandall (2nd ed., § 107). One of the latest cases in which the matter has come up was in Peterson *v.* Iowa (245 U. S. 170). It was there held in the lower court that the statute was not in conflict with the treaty and the supreme court upheld this contention, but Judge White significantly said that the court conceded that if the treaty were applicable it would be controlling. It is true that it was suggested in the case of Fredrickson *v.* Louisiana (23 How. 445), that the United States could not regulate testa-

mentary dispositions or laws of inheritance of foreigners with reference to the property within the states, and, therefore, that a treaty which did so would not be valid. The court said, however, that this question was not involved in the case, since the treaty there under consideration was not in conflict with the statute. The doubt then cast upon the power of the United States is too clearly removed by the great weight of subsequent authority to be more than evidence of the way in which similar doubts as to labor treaties now arising in the minds of those zealous for the protection of state rights are almost certain to disappear when it becomes evident that the American, as well as the international, mind favors them.

But it was not alone in matters relating to inheritance and the ownership of property that treaties of the United States have been held superior to state statutes regulating matters of internal police. Notable instances of this superiority of the federal power are found in connection with treaties with Indians, which were held to be under the treaty clauses of the Constitution and to have equal power and effect with treaties with foreign states. In Worcester *v.* Georgia (6 Peters 515), it was decided that a treaty with the Cherokee Indians and legislation passed to carry it out, nullified a statute of the State of Georgia, purporting to regulate the right of white people to live among the Indians in the territory of Georgia. In United States *v.* 43 Gallons of Whiskey (39 U. S. 188), a treaty with the Chippewas was the authority for a United States marshal to seize property within the territory of the State of Minnesota, outside of the reservation.

In Ward *v.* Race Horse (163 U. S. 594), although the court held that the statute there under consideration did not interfere with the treaty with the Indians, the great care which Justice White gave to proving it, tends at least to show his impression that the right of the state to regulate game within its borders might have been limited by treaty and Justice Brown in dissenting clearly takes this ground. A treaty between the United States and the Seneca Indians was "parcel of the paramount law and must prevail over all state laws in conflict with it." The state law held invalid in that instance was a statute taxing Indian lands for the support of roads and bridges (See Fellows *v.* Denniston, 23 N. Y. 420).

Conflict between the police power and treaties was the subject of many vigorous opinions in the United States courts on the Pacific Coast. The opposition to Mongolian immigration led to a number of state constitutional provisions and state statutes which were in conflict with the treaty with China and which were regularly declared to be void for this reason; thus, the right of a state by constitutional amendment and by statute to prohibit the employment of Chinamen by corporations was denied (Parrott Case, 7 Sawy. 527), an opinion which was extended to municipal corporations (Baker *v.* Portland, 5 Sawy. 577). Even an ordinance of the city of San Francisco limiting the right of a subject of China to follow a lawful trade was held obnoxious to the treaty (see Laundry Ordinance Case, 7 Sawy. 527), and it was said that a clause of the Constitution of Oregon and mining regulations made in pursuance of it were void if in direct conflict with the treaty (Chapman *v.* Toy Long, 4 Sawy. 28).

Frequently in deciding that in a particular case a state police statute was not in conflict with a treaty, the court has intimated that otherwise the treaty would have prevailed. Of this character was the decision in the Compagnie Française *v.* State Board of Health (186 U. S. 380), in which a quarantine statute of the State of Louisiana was in question. Judge Harlan in dissenting held that the statute was a violation of the treaty and added: "Necessary as efficient quarantine laws are, I know of no authority in the states to enact laws in conflict with our treaties with foreign nations." So a state law limiting the right of an alien to recover damages for death, it seems to have been considered by the court, would be void if contrary to a treaty (Maiorano *v.* Railroad Co., 213 U. S. 268).

Legislative and Executive Precedent in Favor of Labor Treaties

The legislative and administrative branches of the government on their side have lately expressed their judgment that the treaty power may invade fields which would be closed normally to Congress. In 1898, the question arose as to whether or not the United States could enter into a treaty with Great Britain to protect fisheries in boundary waters between the United States and Canada. It was referred to the Attorney-

General who said that it was obvious that the United States had no authority to regulate fisheries within the territorial jurisdiction of the states, but since the regulation of fisheries was a proper subject for international agreement, the United States could enter into a treaty for this purpose. To show that the regulation of fisheries was a proper subject for international agreement he cited certain treaties with Great Britain and also the necessity of joint control of the waters in which fish live and spawn, that is, the question as to whether a certain treaty is within the treaty power is determined by precedent and by the necessity of the case arising from the facts (22 Op. Atty.-Gen. 214). A treaty to regulate fisheries was signed on April 11, 1908.

Very recently this same theory has been embodied in a treaty and statutes. By the act of March 4, 1913, certain migratory birds were taken under the custody and protection of the United States Government and the game laws of the various states were set aside by a federal statute. On August 17, 1916, by treaty between the United States and Great Britain on behalf of Canada, the protection for certain of these birds was made international. The statute being subsequently held unconstitutional in United States *v.* Shauver (214 Fed. 154, see 39 Sup. Ct. Rept. 134). Congress on the 3rd of July, 1918, passed a new act regulating migratory birds and declared that it was for the purpose of carrying out the treaty. The President promptly promulgated regulations under the statute. Congress, therefore, clearly assumes that under the treaty power it could take control of a subject otherwise in the exclusive control of the states and pass legislation otherwise not within its power, to carry out a treaty. The Executive has endorsed the opinion of the legislature. The federal district judge who held the statute of 1913 unconstitutional has recently held the treaty and statutes passed under it constitutional.

The best precedent for the power of the United States to enter into treaties without regard to the police power of the states is found in the words of the ordinary commercial treaty guaranteeing reciprocal liberty of residence, of travel and of doing business, to the citizens of one country in the territory of the other. If the police powers of the states are paramount and if no treaty in any way limiting them can be ef-

fective, then these treaties guarantee no protection whatsoever to foreigners and the United States went beyond its powers in negotiating and ratifying them. That no one will contend this for a moment, is the best proof that the question is not whether a treaty can override the police powers of the states, but whether it is a legitimate exercise of the treaty power.

A Labor Treaty would be within the Treaty Power

The extent of the treaty power is the crux of the whole question. Fortunately we have judicial help in aiding us to determine it. Justice Davis in United States *v.* 43 Gallons of Whiskey (93 U. S. 188) said: " It cannot be doubted that the treaty-making power is ample to cover all usual subjects of diplomacy with the different powers." Expressing the same idea rather more fully, Justice Field said in De Geofroy *v.* Riggs (133 U. S. 258):

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 541 [29: 264, 270]. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. Ware *v.* Hylton, 3 U. S. 3 Dall. 199 [1: 568]; Chirac *v.* Chirac, 15 U. S. 2 Wheat. 259 [4: 234]; Hauenstein *v.* Lynham, 100 U. S. 483 [25: 628]; Droit d' Aubaine, 8 Ops. Atty. Gen. 417; People *v.* Gerke, 5 Cal. 381 (pp. 266-267).

In Downs *v.* Bidwell (182 U. S. 244) the court approved a former decision expressing the same idea:

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments [p. 294].

Clearly, the treaty power cannot be used to destroy the constitution or the government set up under it. A treaty which attempted this would not be a proper exercise of the treaty power, but an interference with the rights of a sovereign state. It could only be imposed upon a defeated country, not under a constitutional power, but as the command of a victorious enemy. It cannot be said, however, that a treaty which limits the police power of one of the American states is, therefore, in conflict with the Constitution. The cases already cited are ample authority to the contrary. Furthermore, this power is only one of those granted to the United States by the Constitution. Another is the power to regulate interstate and intrastate commerce, and it is unnecessary now to argue that the police powers of the state do not stand in the way of an act of Congress passed in the legitimate exercise of its authority. The point was raised and decided by Chief Justice Marshall in Gibbons *v.* Ogden (9 Wheat 1). While a doubt was thrown upon it prior to the Civil War, during the period in which the contest for state rights was being waged, it has not been questioned since the defeat of the Confederacy. Its completeness is shown by the expression of the court in Keller *v.* United States (213 U. S. 138):

While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in the court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail [page 146].

But if the police powers of the states must give way before a legitimate exercise of the commerce power by the United States, why should they not equally give away before a proper exercise of the treaty power?

Is the treaty proposed a usual subject of diplomacy? Dr. Andrews has told you how frequently labor questions have been made the subject of treaties between governments and the reasons why. The negotiations of Paris culminating in the labor clauses of the Covenant, are the latest evidence of

the opinion of diplomats; the permanent labor organization included in the treaty testifies to the importance which labor treaties are about to assume in the international social order and prove that in fact international settlement of labor questions is " a subject of negotiation " between nations.

Prëeminently the question is a political one, for determination by the political power of the government. If the President and Senate decide that in justice to the interests of this country and to the world at large the United States should enter into such treaties, their deliberate opinion would undoubtedly have great, if not prevailing, influence upon the court that the subject was proper for negotiation, as against the supporters of a narrow doctrine of state rights.

The same facts which will mould public opinion to demand them will also prove that the treaties are legitimate subjects of negotiation. Dr. Andrews and Mr. Elkus have already told you what these are and if they prove convincing enough to cause the President to negotiate, and the Senate to approve a labor treaty, it is probable that, aided by the precedents, they will induce the Supreme Court to declare it constitutional.